IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 192[illegible].

No. [illegible] 30

THE UNITED STATES ex relatione SKINNER & EDDY CORPORATION, Petitioner,

vs.

J. R. McCARL, Comptroller General of the United States, Respondent.

BRIEF FOR PETITIONER.

LOUIS TITUS,
J. BARRETT CARTER,
Attorneys for Petitioner.

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AUTHORITIES CITED

Cases:

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No. 257.

THE UNITED STATES EX RELATIONE SKINNER & EDDY CORPORATION, PETITIONER,

vs.

J. R. McCARL, COMPTROLLER GENERAL OF THE UNITED STATES, RESPONDENT.

BRIEF FOR PETITIONER.

Opinion Below.

The Supreme Court of the District of Columbia filed no opinion (R. 120). The opinion of the Court of Appeals of the District of Columbia is reported in 8 Fed. (2d) 1011 (R. 123).

Statement of Grounds of Jurisdiction.

The judgment to be reviewed was entered by the Court of Appeals of the District of Columbia Novem-

ber 2, 1925, on an appeal from a judgment of the Supreme Court of the District of Columbia dismissing a petition praying for a writ of mandamus directing respondent to pass upon a claim petitioner had filed with him under the provisions of Section 951 of the United States Revised Statutes.

The proceedings below were in accordance with the practice provided by the District Code (Sections 1273 to 1276, inclusive, of the Code of Law of the District of Columbia) and were as follows:

Petitioner filed its petition in the Supreme Court of the District of Columbia praying for a writ of mandamus, as above set forth (R. 1). Respondent filed an answer to this petition (R. 11). Petitioner demurred to this answer, which demurrer was overruled (R. 17-18). Petitioner filed a plea and traverse to the answer (R. 19). Respondent filed a demurrer to this plea and traverse (R. 119), which demurrer was sustained and the suit dismissed (R. 120).

On an appeal from the judgment of dismissal, the Court of Appeals of the District of Columbia affirmed the judgment of the lower court (R. 125). A petition for rehearing in the Court of Appeals was denied November 21, 1925 (R. 141). The judgment of the Court of Appeals has, therefore, become a final judgment.

The case comes to this Court on writ of certiorari under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 St. L. 936).

Statement of Facts.

The facts appear in the pleadings and are admitted by the demurrer of respondent. They are as follows:

(1) From May 28, 1917, to December 29, 1919, inclusive, petitioner entered into 18 contracts or supplemental contracts with the United States Shipping Board Emergency Fleet Corporation. Five of the principal contracts were for the construction of ships by petitioner for said Fleet Corporation (R. 23, 42, 58, 72, 88); one contract was for the sale by the Fleet Corporation to the petitioner of a shipbuilding plant at Seattle, Wash., (R. 54); and eight of the contracts were for repairs to vessels (R. 112-116).

(2) On April 25, 1919, all work on 25 ships to be constructed under two of the contracts was canceled by the Fleet Corporation (R. 119). Differences arose between petitioner and the Fleet Corporation, growing out of said several transactions, and on December 28, 1920, petitioner filed with the Auditor for the State and other departments a claim against the United States growing out of these contracts. The Auditor, regarding the claim as one against the Fleet Corporation, transmitted it to the Fleet Corporation and took no further action thereon (R. 2-6).

(3) On June 15, 1921, and upon the theory that the contracts under which the claim arose were contracts of the United States, suit was filed by petitioner in the United States Court of Claims on substantially the same claims presented to the Auditor (R. 12).

(4) On April 4, 1923, after it had been determined by this Court, in the case of *Sloan Shipyards Corporation vs. United States Shipping Board Emergency Fleet Corporation*, and allied cases, 258 U. S. 549, that similar contracts were Fleet Corporation contracts, the suit in the Court of Claims was dismissed by petitioner, without prejudice (R. 19). Subsequent to the order of the Court of Claims of April 4, 1923, allowing the dismissal of said suit, the Court of Claims set aside said order of dismissal, but on mandamus from the Supreme Court of the United States (*In Re Skinner & Eddy Corporation*, 265 U. S. 86), said order of dismissal was restored on the 16th day of May, 1924.

(5) On May 1, 1923 (after the suit was voluntarily dismissed in the Court of Claims), suit was filed by petitioner in the State court at Seattle, Wash., against the Fleet Corporation, for money claimed by petitioner to be due it from the Fleet Corporation on the same contracts which were the basis of the suit in the Court of Claims. That suit was removed by the Fleet Corporation to the United States District Court for the Western District of Washington, and the United States Attorney for that district appeared in said cause, by direction of the Attorney General of the United States, and filed a motion to dismiss, on the ground, among others, that the suit was a claim against the United States. That motion, at the time this proceeding was commenced, was still pending and undisposed of (R. 3).

(6) On April 16, 1923, the Fleet Corporation made an assignment to the United States of

> "All the goods, chattels, bonds secured by mortgages, bonds, notes, shares of stock, contracts, securities, claims, personal property, and choses in action, including accounts against divers persons for the payment of money, and all personal property of every kind and description whatsoever wherever the same may be situated" (R. 4).

By virtue of said assignment, the United States asserts a claim against petitioner, growing out of the contracts hereinbefore referred to, and through its attorneys and agents was, at the time this suit was filed, in active preparation to file suit against petitioner on such claim (R. 4). (Since this suit was filed, the United States has actually filed suit against petitioner on claims growing out of said contracts, without, however, alleging said assignment, as will hereinafter appear.)

(7) In anticipation of suit by the United States on said assigned claims, petitioner, on September 4, 1924, in order to take advantage of and to comply with the provisions of Section 951 of the United States Revised Statutes (quoted in the margin)* filed with the re

*"Section 951, R. S. In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to

spondent a claim against the United States, the clai
being based on the same contracts between the Fle
Corporation and petitioner hereinbefore referred
(R. 2). The respondent refused to act on the clai
until after the conclusion of the suit filed by pe
tioner at Seattle, Wash., against the Fleet Corpor
tion (R. 6), but when the case at bar came on f
hearing in the Supreme Court of the District
Columbia, the attorney for the respondent stated
open court (as appears from the order of the cou
overruling the demurrer) (R. 18) that the answ
filed by the respondent should be considered a deni
of jurisdiction on the part of respondent to consid
the claim at all. This was also the principal groun
of respondent's demurrer to petitioner's plea a
traverse (R. 119-120).

(8) It is alleged that when the United States fil
suit against petitioner on the claim assigned to it
the Fleet Corporation the suit will be filed in t
United States District Court for the Western Distri
of Washington, and that the judge presiding in th
court held, on February 8, 1924, in the case of *Unit
States* vs. *Fisher Flouring Mills Company*, 295 Fe
691, that in a suit brought by the United States on
cause of action assigned to it by the Fleet Corporati

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the satisfaction of the Court that the defendant is,
the time of the trial, in possession of vouchers n
before in his power to procure, and that he was pr
vented from exhibiting a claim for such credit at t
Treasury by absence from the United States or
some unavoidable accident."

the defendant in such suit, by reason of the provisions of Section 951, R. S., could not plead a set-off, credit, or counter-claim unless it had been first presented to the accounting officers of the Treasury and disallowed (R. 11).

(9) In addition to the foregoing facts, it was orally stated by counsel for respondent at the hearing in the Court of Appeals, and conceded by counsel for petitioner to be a fact, that after the filing of the petition for mandamus in this case the United States actually commenced a suit against petitioner upon these contracts in the United States District Court for the Western District of Washington. In the suit filed, the assignment from the Fleet Corporation to the United States is not pleaded, but said suit is based on the theory that the contracts were originally made by the United States. The pendency of this suit and of the suit filed by petitioner against the Fleet Corporation was the ground upon which the Court of Appeals of the District of Columbia affirmed the judgment of the lower court (R. 123; 8 Fed. (2d) 1011), the court holding that the issuance of the writ of mandamus prayed by petitioner would be an unwarranted interference with the action of the court in which said two suits were pending.

Specification of Errors to be Urged.

The assigned errors to be urged are that the Co
of Appeals of the District of Columbia erred:

(1) In holding that the Comptroller General co
properly refuse to pass upon the claim presented
him by petitioner on September 4, 1924, under S
tion 951 of the Revised Statutes, thus possibly dep
ing petitioner of the right to prove a credit, set-off,
counter-claim to the suit threatened by the Uni
States.

(2) In holding that after the suit was filed by
United States it was then too late for the Comptro
General to pass upon credits claimed by petitioner
such suit, and that to direct the Comptroller Gene
to pass upon such credits would be an unwarran
interference with the court in which such suit is pe
ing.

(3) In holding that because the claim assigned
the United States is subject to all existing equit
that, therefore, there is no necessity for action by
Comptroller General upon the claim for credits
sented to him, in order to insure to petitioner
benefit of such credits in a suit filed by the Un
States upon such assigned claim.

(4) In affirming the judgment of the Supreme C
of the District of Columbia holding that the Co
troller General has no jurisdiction to pass upon
claim presented to him on September 4, 1924, grow

out of contracts with the United States Shipping Board Emergency Fleet Corporation.

ARGUMENT.

Summary of Argument.

I.

Section 951 of the Revised Statutes gives the defendant in a suit by the United States a right to a counter-claim, credit, or set-off. But, before any such counter-claim, credit, or set-off can be admitted at the trial, a claim therefor must be presented to the accounting officers of the Treasury and be by them disallowed in whole or in part.

R. S., Section 951.

United States vs. Wilkins, 6 Wheat. 135, 144.

Watkins vs. United States, 9 Wall. 759, 764.

Halliburton vs. United States, 13 Wall. 63, 65.

United States vs. Fillebrown, 7 Pet. 28, 48.

Railroad Co. vs. United States, 101 U. S. 543, 548.

Smythe vs. United States, 188 U. S. 156, 172.

United States vs. Wade, 75 Fed. 261, 266.

United States vs. Cantrall, 176 Fed. 949, 954.

II.

The provisions of Section 951 apply to suits by the United States upon assigned claims, as well as suits by the United States upon direct claims.

R. S., Section 951.

United States vs. Fisher Flouring Mills Co., 295 Fed. 691.

III.

The duties of the six auditors having been transferred by statute to the Comptroller General, claims for credits must now be presented and passed upon by the Comptroller General.

Act of June 10, 1921, 42 St. L. 23-27.

IV.

The Comptroller General still has jurisdiction to pass upon claims for credit under Section 951 of the Revised Statutes, notwithstanding the provisions of the Merchant Marine Act of June 5, 1920 (41 Stat. L. 988). Section 951, R. S., gives to defendants a right to set-off which did not exist at common law (*Watkins vs. United States*, 9 Wall. 759, 764; *United States vs. Cantrall*, 176 Fed. 949, 954). This right cannot be taken away by implication. The Merchant Marine Act does not purport to repeal or modify in any manner Section 951, R. S., nor is there anything in the Merchant Marine Act which requires a claim for credit under Section 951, R. S., to be presented to the Shipping Board instead of to the accounting officers of the Treasury. Repeals or modifications of statutes by implication are not favored.

Cope vs. Cope, 137 U. S. 682, 686.

Henrietta Mining & Milling Co. vs. Gardner, 173 U. S. 123, 128.

Franke vs. Murray, 248 Fed. 865, 869.

Moss vs. United States, 29 App. D. C. 188, 197.

V.

A claim for credit under Section 951, R. S., may be presented to the Comptroller General and passed upon by him, even after suit commenced by the United States, and a writ directing the Comptroller General to act upon such claim is not an interference with the court wherein such suit is pending.

United States vs. Hawkins, 10 Pet. 125, 131.

VI.

The contracts upon which the threatened suit is based are contracts of the Fleet Corporation, not contracts of the United States.

Sloan Shipyards vs. U. S. S. B. E. F. C., 258 U. S. 549.

United States vs. Strang, 254 U. S. 491.

The Lake Monroe, 250 U. S. 246.

United States vs. Matthews, 282 Fed. 266.

U. S. S. B. E. F. C. vs. Banque Russo Asiatique, 286 Fed. 918.

Providence Eng. Corp. vs. Downey, 294 Fed. 641.

If the Fleet Corporation, therefore, had commenced suit upon these contracts, defendant could have pleaded and proved its claimed credits, but the assignment by the Fleet Corporation to the United States and the threatened suit by the United States upon such assignment places the defendant in a position where

it is in danger of losing its rights to establish such credits in such suit unless the Comptroller General is compelled to act.

VII.

Whether the suit that is eventually maintained by the United States is the one which it has already commenced upon the contracts, without pleading the assignment, upon the theory that the United States was the original party to the contracts, or whether the United States will eventually file suit upon the assignment, Section 951, R. S., is applicable. The refusal of respondent to act places petitioner in danger of losing its right to present at the trial its claim for the credits to which it believes itself entitled. To protect petitioner in this right, the writ of mandamus asked for should be issued.

Point I.

SECTION 951 OF THE REVISED STATUTES CONFERS UPON THE DEFENDANT IN A SUIT BY THE UNITED STATES A SUBSTANTIAL RIGHT WHICH CANNOT BE ARBITRARILY DENIED BY THE COMPTROLLER GENERAL. WHEN A CLAIM FOR SUCH CREDIT IS PRESENTED TO THE COMPTROLLER GENERAL, IT IS HIS DUTY TO ACT UPON SUCH CLAIM.

The record shows that the United States is threatening a suit against petitioner on claims assigned to it by the Fleet Corporation, and arising out of contracts made between petitioner and the said Fleet Corporation. The petitioner, in order to take advantage of the

provisions of Section 951 of the Revised Statutes, submitted, on September 4, 1924, to the respondent a claim which was a set-off or credit to the threatened suit. The respondent refused to take any action upon this claim.

Section 951 of the Revised Statutes provides, in so far as material, as follows:

> "In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part. * * *"

While the statute says "no claim for a credit," the Federal courts construe this to include claims by way of set off, or counter claim, and it is essential, before such a claim can be considered by the court, that it shall first have been presented to the accounting officers of the Treasury and disallowed.

The case of *United States vs. Wilkins*, 6 Wheat. 135, 144, indicates how broad a field the statute covers. In that case the court said:

> "There being no limitation as to the nature and origin of the claim for a credit which may be set up in the suit, we think it a reasonable construction of the act, that it intended to allow the defendant the full benefit, at the trial, of any credit, whether arising out of the particular transaction for which he was sued, or out of any distinct and independent transaction, which

would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States. The object of the act seems to be, to liquidate and adjust all accounts between the parties, and to require a judgment for such sum only, as the defendant in equity and justice should be proved to owe to the United States. If this be the true construction of the act, which we do not doubt, the defendant might well claim a credit in this suit for the sums due him, even if they had grown out of distinct and independent transactions, for he is legally, as well as equitably, entitled to them."

See also:

Watkins vs. United States, 9 Wall. 759, 764;
Halliburton vs. United States, 13 Wall. 63, 65;
United States vs. Fillebrown, 7 Pet. 28, 48;
Railroad Company vs. United States, 101 U. S. 543, 548;
Smythe vs. United States, 188 U. S. 156, 172;
United States vs. Wade, 75 Fed. 261, 266;
United States vs. Cantrall, 176 Fed. 949, 954.

It follows from the foregoing decisions that claims for credit, set-off, or counter-claim, before they may be received by the court in a suit by the United States, must be disallowed in whole or in part by the Comptroller General, who now is the accounting officer of the Treasury (Act of June 10, 1921, 42 Stat. L. 23).

The right to set-off did not exist at common law and would not exist in favor of a defendant in a suit

brought by the United States except for the provisions of Section 951, R. S.

Watkins vs. United States, 9 Wall. 759, 764.
United States vs. Cantrall, 176 Fed. 949, 954.

The statute gives this right of set-off or credit to a defendant in a suit by the United States, and the Comptroller General cannot deprive a defendant of such right by arbitrarily refusing to act.

The respondent, having refused to act, may be compelled to do so by mandamus.

Work, Secretary of the Interior, vs. Rives, 267 U. S. 175.

Point II.

SECTION 951 OF THE REVISED STATUTES APPLIES IN SUITS BROUGHT BY THE UNITED STATES UPON ASSIGNED CLAIMS, AS WELL AS SUITS BY THE UNITED STATES ON DIRECT CLAIMS.

Counsel for petitioner believe that this Court has held that contracts such as those involved in this case between petitioner and the United States Shipping Board Emergency Fleet Corporation are contracts of the Fleet Corporation, and not contracts of the United States. (See cases cited *infra* under Point VI hereof.)

The record shows that whatever claims the Fleet Corporation has against the petitioner on account of these contracts have been assigned to the United States, and that the United States is threatening a suit thereon. The claims for credit which the petitioner

has against this threatened suit arise out of the original contracts and transactions, and therefore would be proper claims for credit in the event the Fleet Corporation itself brought suit, and could be pleaded and proved in such a suit without hindrance.

If the claim had been assigned by the Fleet Corporation to an individual, and suit brought by such individual against petitioner, petitioner could have pleaded its claimed credits and would have been in no worse position than before the assignment was made.

Ballinger's Annotated Code & Statutes, Washington, Section 4835.

The language of Section 951, R. S., is "in suits brought by the United States." This language is broad enough to include all suits. There is no exception made in the case of a suit upon an assigned claim, and it would therefore seem to follow that Section 951 applies where the United States sues upon an assigned claim as well as where it sues upon a direct claim, and it was so held by the United States District Court for the Western District of Washington in the case of *United States vs. Fisher Flouring Mills Company*, 295 Fed. 691.

This Court has said, although not directly passing on the question of the application of the statute to assigned claims, that the object of the statute was to require a judgment—

> "for such sum only as the defendant in equity and justice should be proved to owe the United States."
>
> *United States vs. Wilkins, supra.*

If this be the object of the statute, it is clearly as applicable to assigned claims as to direct claims.

The assignment of the claim to the United States gives it no greater validity than it possessed in the hands of the assignor.

United States vs. Bulard, 3 Pet. 12, 30.

Neither does an assignment of a claim to the United States change the nature or legal effect thereof.

United States vs. Nashville, etc., Ry. Co. 118 U. S. 120, 125.

So that the situation that arises is as follows: If these contracts had been sued upon by the Fleet Corporation, or if they had been assigned to some other person than the United States, and suit brought thereon by the assignee, petitioner could have set up its credits and received proper allowance therefor in such suit. However, should suit be brought by the United States on the assigned claim, and it is admitted by the demurrer that such suit will be brought, petitioner is immediately met with the provisions of Section 951 of the Revised Statutes and the decision of the United States District Court for the Western District of Washington in the case of *United States vs. Fisher Flouring Mills Co.*, 295 Fed. 691, and it, therefore, runs grave hazard of having a judgment rendered against it in such suit, notwithstanding that it may have a perfect defense by way of credits which it is not allowed to set up because the Comptroller General refuses to pass upon the claim presented to him.

It is true that it now appears, by reason of the oral admissions in the Court of Appeals, that the suit which has actually been filed by the United States is a direct suit upon the contracts, without alleging the assignment. If the Government should be defeated in such suit upon the ground that the contracts are contracts of the Fleet Corporation and not contracts of the United States, there is nothing to prevent the Government from immediately filing suit upon the assigned claim, as the statute of limitations does not run against the Government.

Point III.

THE DUTIES OF THE SIX AUDITORS HAVING BEEN TRANSFERRED BY STATUTE TO THE COMPTROLLER GENERAL, CLAIMS FOR CREDITS UNDER SECTION 951, R. S., MUST NOW BE PRESENTED AND ACTED UPON BY THE COMPTROLLER GENERAL.

The Act of June 10, 1921 (42 Stat. L. 23-27), confers upon the Comptroller General

> "all powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department,"

and Section 236 of the Revised Statutes was amended to read as follows:

> "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Govern-

> ment of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

The same act provides that the General Accounting Office shall be under the control and direction of the Comptroller General of the United States.

It is, therefore, clear that it is the duty of the Comptroller General, under Section 951, R. S., to pass upon the claim which petitioner presented to him.

Point IV.

THE COMPTROLLER GENERAL HAS JURISDICTION TO PASS UPON THE CLAIMS PRESENTED, NOTWITHSTANDING THE PROVISIONS OF THE MERCHANT MARINE ACT OF JUNE 5, 1920.

The Supreme Court of the District of Columbia overruled petitioner's demurrer to the answer filed by respondent apparently upon the ground that the Comptroller General had no jurisdiction over the claims presented (R. 18). Counsel for respondent had contended that the Merchant Marine Act of June 5, 1920, gave exclusive jurisdiction to consider all claims of the character presented by petitioner to the Shipping Board, and, therefore, that the consideration and allowance or rejection of these claims was a matter over which the Comptroller General had no power.

This position is also taken by the Solicitor General in his brief filed in opposition to the granting of the petition for certiorari in this case. It therefore be-

comes necessary to consider the effect of the Mercha
Marine Act, if any, upon Section 951, R. S.

The Merchant Marine Act of June 5, 1920 (41 St
L. 988), subdivision C, Section 2, provides as follo
(p. 989):

> "As soon as practicable after the passage
> this Act the board shall adjust, settle, and liq
> date all matters arising out of or incident to t
> exercise by or through the President of any
> the powers or duties conferred or imposed up
> the President by any such Act or parts of Act
> and for this purpose the board, instead of t
> President, shall have and exercise any of su
> powers and duties relating to the determinati
> and payment of just compensation: *Provide*
> That any person dissatisfied with any decisi
> of the board shall have the same right to s
> the United States as he would have had if t
> decision had been made by the President of t
> United States under the Acts hereby repealed

Unless the quoted provisions of this act repeal
modify Section 951, R. S., then Section 951 still stan
as originally written. There is nothing in the Me
chant Marine Act which requires that a claim t
credit under Section 951, R. S., should be presented
the Shipping Board instead of to the accounting o
ficers of the Treasury. While the Merchant Mari
Act does provide that the Shipping Board shall "a
just, settle, and liquidate" matters arising out of th
exercise of the war powers granted to the Presider
it would be a strange construction to interpret th
into a statement that for the purposes of Section 95

R. S., a claim for credit must be presented to the Shipping Board.

Repeals or modifications of statutes by implication are not favored.

Cope vs. Cope, 137 U. S. 682, 686.

Henrietta Mining & Milling Co. vs. Gardner, 173 U. S. 123, 128.

Franke vs. Murray, 248 Fed. 865, 869.

Moss vs. United States, 29 App. D. C. 188, 197.

For the purpose of this argument only, we may grant that the above-quoted provision from the Merchant Marine Act gives the Shipping Board full authority, where it is possible, to adjust, settle, and liquidate all claims arising out of Fleet Corporation contracts. But in this case the Board, for some reason undisclosed by the record, has been unable to effect a settlement and has been unable to adjust and liquidate the claim, and the United States has actually commenced or is threatening a suit thereon. Section 2, subdivision (*b*), subparagraph (2), of the Merchant Marine Act is as follows (41 Stat. L. 988):

> "All rights, interests, or remedies accruing or to accrue as a result of any such contract or agreement or of any action taken in pursuance of any such Act or parts of Acts shall be in all respects as valid, and may be exercised and enforced in like manner, subject to the provisions of subdivision (c) of this section, as if this Act had not been passed."

It seems clear, therefore, that there was no intent on the part of Congress to deprive any person who had

contracts with the Fleet Corporation of any righ
remedies which such person might have with re
to said contracts. What subdivision (c), previ
quoted, really means, therefore, is that the Shi
Board is given the authority to make settle
where possible, which authority it would not othe
have had.

But it does not seem reasonable that Congre
passing the Merchant Marine Act, intended to de
a defendant of his right to credits in cases wher
United States sued upon Fleet Corporation cont

It also seems unreasonable that Congress int
by the passage of the Merchant Marine Act
amend Section 951, R. S., as to require claim
credit in suits by the United States involving
Corporation contracts to be presented to the Shi
Board instead of to the accounting officers o
Treasury.

It is true that in the case of *United States vs.*
ball, 101 U. S. 726, this Court held that a present
of the claim involved in that case to the Commiss
of Internal Revenue was a compliance with S
951, R. S. The decision of the court was mere
the effect that where the United States had s
collector of internal revenue, a presentation of a
to the Commissioner of Internal Revenue, and
jection by that officer of such credit, was a pres
tion to and rejection by the "accounting officers
Treasury." The Commissioner of Internal Re
is an officer of the Treasury, and was held in that
to be an accounting officer of the Treasury, but

is far from holding that the Shipping Board, which is an independent establishment of the United States, is an accounting officer of the Treasury.

There is no conflict of jurisdiction between the Comptroller General and the Shipping Board. The Merchant Marine Act gives the Shipping Board the power to make settlements, if it can, of certain controversies. But where a settlement is not made and a suit commenced or threatened by the United States, then the Comptroller General is the official to whom must be presented all claims for credit in such suit.

Point V.

A CLAIM FOR CREDIT MAY BE PRESENTED TO THE COMPTROLLER GENERAL AND PASSED UPON BY HIM EVEN AFTER SUIT COMMENCED BY THE UNITED STATES.

The Court of Appeals in its opinion held that because suits had actually been commenced on these contracts, the issuance of the writ of mandamus by the Supreme Court of the District of Columbia would be an unwarranted interference by the Supreme Court with a court of co-ordinate jurisdiction, and that, therefore, it must affirm the Supreme Court's refusal to issue such writ.

The writ requested would simply require the Comptroller General to take action upon the claim presented to him. Such writ is not directed to the District Court at Seattle, and it is apparent that it could not interfere with any action that the Seattle court might choose to take. If the Comptroller General

acts, he must either allow or disallow the claim in whole or in part. If he disallows the claim, the court manifestly would not be interfered with, for the whole case would be left to its determination, but in that event the defendant would have put itself in a position where it would have the opportunity of proving, if it could, the credits which the Comptroller General had disallowed. If, on the other hand, the Comptroller General allowed the claim, such action would not interfere with the court, for the reason that such action would be merely an admission by the United States, through its properly authorized officer, that the amounts allowed were due. A plaintiff in an action can always admit, if he chooses, that defendant is entitled to certain credits and such admission does not constitute an interference with the court before which the case is pending. It is manifest, therefore, that to order the Comptroller General to act would be no interference with the Seattle court.

In the case of *United States* v. *Hopkins*, 10 Fed. 125, certain credits in favor of one of the defendants had been offered at the trial. The Attorney General, relying on Section 951, R. S., objected to the consideration of these credits upon the ground (see page 128):

> "It did not appear that the documents to sustain them had been presented to the proper officers of the Treasury, before the commencement of this suit."

In its decision on this point, this Court said (page 131 of the opinion):

> "In regard to so much of the exception which objects to the introduction of the bills, orders or documents claimed as credits in the defendants' supplemental answer, because they had not been presented to the proper accounting officers, and disallowed, *previous to the commencement of the suit*, we remark, it has never been the practice of the circuit courts, in suits under the law of the 3d March, 1797," (Sec. 951, Rev. Stat.) "to deny to defendants a claim for credits against the United States, because they had not been presented and disallowed, before the commencement of the suit. The practice to allow a claim for credits, *after the suit has been commenced*, is sustained by the spirit and letter of the third and fourth sections of the statute.
>
> • • • • • • •
>
> "He" (defendant) "may have them submitted to a jury, at the trial, if they have been refused by the accounting officers of the Treasury, after the suit has been instituted." (Italics ours.)

Here is a direct holding by this Court that the accounting officers of the Treasury should pass upon a claim, even if presented after a suit covering the same subject had been filed. It is apparent that the Court of Appeals failed to give proper effect to this decision. Moreover, the claim was presented to the Comptroller General before suit was filed by the United States.

Point VI.

THE CONTRACTS UPON WHICH THE THREATENED SUIT IS BASED ARE CONTRACTS OF THE FLEET CORPORATION—NOT CONTRACTS OF THE UNITED STATES. THEREFORE, ANY SUIT EVENTUALLY MAINTAINED BY THE UNITED STATES MUST BE UPON AN ASSIGNED CLAIM.

Counsel for petitioner firmly believe that this Court has directly held that contracts such as those involved in this case between the petitioner and the Fleet Corporation are Fleet Corporation contracts and not contracts of the United States.

Sloan Shipyards Co. v. U. S. S. B. E. F. C., 258 U. S. 549.

United States ex rel. Strang, 254 U. S. 491.

The Lake Monroe, 250 U. S. 246.

Contracts Out of Which Claim Arises are Contracts of Fleet Corporation.

The first contract between the parties is dated May 28, 1917 (R. 23), and is between Skinner & Eddy Corporation and the United States Shipping Board Emergency Fleet Corporation. This contract omits the words "representing the United States," which words are found in several of the subsequent contracts. The Act of June 15, 1917 (40 Stat. L. 182), was the first act of Congress to give the President his war powers and as this contract was executed prior to that date, it can scarcely be argued that the contract was made under that act.

The main shipbuilding contracts subsequent to the first one do contain the words "representing the United States." The effect of these words will be considered later. However, there were numerous contracts for repairs to ships, as well as other contracts, which were made by the Fleet Corporation in its own name, the words "representing the United States" being omitted (R. 112-116).

Contract for Purchase of Ship Yard.

One of the most important contracts between the parties was made on the 11th day of May, 1918 (R. 54). This contract is worthy of more than a cursory examination, because it is the foundation agreement of the greater part of the dealings between Skinner & Eddy Corporation, on the one hand, and the Fleet Corporation, on the other. It provides, not only for the sale by the Fleet Corporation to Skinner & Eddy Corporation of a shipyard, but also provides for the construction of 50 steel ships at a total contract price of almost one hundred million dollars. It also refers to the purchase of a shipyard made by the Fleet Corporation from the Seattle Construction and Dry Dock Company under a contract dated May 10, 1918.

This contract of May 10, 1918 (R. 56), is for the purchase by the Fleet Corporation of the entire shipbuilding plant of the Seattle Construction and Dry Dock Company, this being the same plant that the Fleet Corporation, the very next day, agreed to sell to Skinner & Eddy Corporation. The purchase price to the Fleet Corporation of this plant was $3,874,313.

of this purchase price $1,374,313 was to be paid in cash and the balance to be paid by accepting the property subject to two mortgages totaling $2,500,000. This contract of May 10, 1918, wherein the Fleet Corporation agreed to purchase this property, appears on its face to be a contract of the Fleet Corporation, as the words "representing the United States" do not appear. After reciting the existence of two mortgages on the property, the contract contains the following provision (R. 56):

> "We, or our nominee, will assume these mortgages, if after an examination of the provisions of the mortgages or deeds of trust we are convinced that a foreclosure would follow if we did not assume them. We shall likewise take such steps as may be necessary to relieve your other assets from the liens of these mortgages, and will hold you harmless from the possibility of a deficiency judgment."

To foreclose a mortgage necessarily implies that the property itself shall be sold to satisfy the mortgage, and the owner ousted from possession. The United States cannot be ousted of possession of property which it owns, and its title foreclosed by the process of foreclosing a mortgage. Neither the Court of Claims nor any other court would have jurisdiction of such an action.

In *The Siren*, 7 Wall. 152, 157, the Supreme Court said:

> "So also express contract liens upon the property of the United States are incapable of enforcement. A mortgage upon property, the

> title to which had subsequently passed to the United States, would be in the same position as a claim against a vessel of the Government, incapable of enforcement by legal proceedings. The United States, possessing the fee, would be an indispensable party to any suit to foreclose the equity of redemption, or to obtain a sale of the premises."

The last part of the clause above quoted from the contract of May 10, 1918, is:

> "Will hold you harmless from the possibility of a deficiency judgment."

In other words, here is a guarantee to pay the debt of another, including principal, interest and costs. Such a contract could hardly be made on behalf of the United States.

As the contract itself does not even purport to bind the United States, and as it contains agreements that no agent of the United States could have made, it necessarily follows that this agreement to buy the yard was made by the Fleet Corporation in its own corporate capacity.

Turn now to the agreement of May 11, 1918, which was the agreement wherein the Fleet Corporation undertook to sell this yard to Skinner & Eddy Corporation (R. 54). We find that this agreement also is signed by the Fleet Corporation in its own capacity, there being nowhere any indication that the Fleet Corporation is representing the United States. There was at this time no authorization to the President by

Congress to lease or to sell yards, or to dispose
them in any manner, and there never was any a
thority in the President or the Fleet Corporation
anyone else, to lease, sell or otherwise dispose of suc
property of the United States, until Congress gav
such authority on the 19th of July, 1919, considerabl
more than a year after this transaction. On th
date Congress passed the Sundry Civil Appropri
tions Act (41 St. L. 163) and provided in this act
follows (p. 181):

> "Any material or plant, as defined under th
> emergency shipping fund provision of the D
> ficiency Appropriation Act approved June
> 1917, acquired by the United States Shippin
> Board Emergency Fleet Corporation, may
> disposed of as the President may direct."

It is apparent, therefore, that the Fleet Corpora
tion, as the agent of the Government, could neith
have leased nor sold this yard on the date it made th
contract for the reason that there was no authoriz
tion by Congress covering such transactions.

It is a fundamental law that property of the Unit
States cannot be disposed of, except under positiv
authority from Congress. *The Constitution of th
United States*, Article IV, Section 3, par. 2, reads:

> "The Congress shall have power to dispose
> and make all needful rules and regulations r
> specting the territory or other property belon
> ing to the United States; and nothing in th
> Constitution shall be so construed as to preju
> dice any claims of the United States, or of an
> particular state."

Main Shipbuilding Contracts.

As these contracts are all in practically the same form, we refer to only one—the contract of June 1, 1918 (R. 72). This contract contains in the caption the words "representing the United States," but it also declares that the Fleet Corporation, party of the second part, is the "owner." Throughout the contract every obligation and undertaking on the part of the second party, is set out as the obligation and undertaking of the *owner*. It is the *owner* that is to accept the vessels, and it is the *owner* that is to pay for them. It is the *owner* that has the right to appoint inspectors to examine the work. Any notice of rejection must be signed by a representative designated by the *owner*. If there is an increase in labor costs, it must be borne by the *owner*, and if there are any decreases in such costs, it is the *owner* that receives the benefit. Any overtime, in order to charge the *owner*, must be specifically authorized by the *owner* in advance. Any increase in freight rates is to be borne by the *owner*. It is the *owner* that may make alterations, omissions, additions or substitutions, in which event if the cost of construction is increased, it is the *owner* that will pay such increase. In case of advanced delivery, the *owner* agrees to pay a bonus therefor, and in case of failure to deliver within the times designated in the contract, the contractor must pay the *owner* a penalty.

Under the terms of the contract, no one is bound or obligated on the part of the second party, except the

owner. There is no obligation whatever on the part
the *United States*, unless the United States is it
the *owner*.

Examining the contract, then, for the purpose
determining who really is the "owner," in addition
the positive statement in the caption, we find the
lowing:

In subdivision 4 of Article II (R. 75) occurs
following clause:

> "If at any time within six months after
> aforesaid acceptance of any of the said vess
> any defect in the material or workmansh
> other than such as are due to fair wear a
> tear or misuse, shall appear, same shall be c
> rected and repaired to the satisfaction of
> Director General of the Owner, . . ."

We know that there was a Director General of
Fleet Corporation, but of course the United Stat
had no such officer. The words, "Director Gener
of the Owner" occur all through these contracts.

In addition to these clauses indicating that
"Owner" must be the Fleet Corporation, there is
clear distinction made in several of the clauses in
contract between the "Owner" and the United State
In Article III, Section 2, it is provided (R. 77):

> "If the Contractor be delayed or obstruct
> in the transaction or completion of the wo
> provided for by this contract by the act, dela
> neglect or default of the Owner or by reason
> alterations or additions by the Owner, or t
> commandeering by the United States Gover
> ment of materials, . . ."

Article XX is as follows (R. 84):

> "It is recognized in view of war conditions, that it may become necessary for the United States to exercise control over the manner and priority in which materials and equipment are obtained under this contract. It is agreed between the parties hereto that if it is desired by the *Owner and or the United States*, that all contracts and agreements for equipment and materials to be used under this contract shall be submitted to the Owner and or the United States, and that any orders given to the Contractor by the Owner, or the United States with regard to such contracts and agreements, will be promptly complied with by the Contractor."

Here is a clear distinction between the Owner and the United States.

In addition, the attesting clause of every contract is as follows (R. 85):

> "In witness whereof the parties hereto have caused this contract to be signed by their respective officers and their corporate seals to be hereunto affixed. * * *."

Here is a statement that the contract is signed by the respective officers of the parties, and the corporate seals of the parties attached. These contracts are signed by officers of the Fleet Corporation and the seal of the Fleet Corporation is attached. These officers of the Fleet Corporation are not officers of the United States. *United States vs. Strang*, 254 U. S. 491.

Intent of Congress was That Fleet Corporation Sh
Contract on Its Own Account.

The United States Shipping Board Emerge
Fleet Corporation was incorporated under the gen
laws of the District of Columbia. All of its cap
stock has been at all times owned by the United Sta

The Act of June 15, 1917 (40 St. L. 182), author
the President to place orders for the construction
ships, appropriated money therefor, provided t
the President might delegate the powers given h
and then contained the following provision (p. 18

> "*Provided*, That all money turned over to
> United States Shipping Board Emergency F
> Corporation may be expended as other mon
> of said corporation are now expended."

This clause was inserted with the obvious purp
that the Fleet Corporation should have entire fr
dom in contracting, and that all the ordinary gove
mental restrictions surrounding the making of c
tracts of the Government should be removed.

That this was the clear intent of Congress appe
from the remarks made in the Senate at the time t
particular clause of the Act of June 15, 1917, w
under consideration. Senator Underwood, in discu
ing the Act of June 15, 1917, and this particular p
vision thereof, said (Vol. 55, part 4, *Congressio*
Record, 65th Congress, page 3540):

> "I was told by Gen. Goethals that under t
> terms of this bill, if passed, he would be nam
> as the agency, or rather that the Emergen

> Fleet Corporation, of which he is general manager, would be named as the agency to expend this money. He desired the authorization to come in that way, for this reason. He said that it would give him a broader latitude in which to make his contracts. He could make them as a corporation, and not be bound by the requirements of law that would restrict his action if he made them as a governmental officer; in other words, if he is designated as a governmental officer, he would probably have to publish advertisements for bids in many cases, while acting for a corporation he would not have to do so. As a governmental officer in carrying out this provision he would have to make many reports and be delayed by red tape and technicalities that would not embarrass him if he were carrying on the transaction acting for a corporation. Of course, the corporation is owned by the Government and controlled by the Government; the Government is the entire corporation; but he expressed to me his view that he would have greater latitude."

Authorities Hold These to be Fleet Corporation Contracts.

The leading authority is the combined cases of *Sloan Shipyards Corporation vs. United States Shipping Board Emergency Fleet Corporation; Astoria Marine Iron Works vs. United States Shipping Board Emergency Fleet Corporation*, and *United States Shipping Board Emergency Fleet Corporation vs. Wood, Trustee*, 258 U. S. 549.

We eliminate largely from this discussion the *Sloan* case, because the decision of this Court in that case

appears to have rested mainly upon the ground that the complaint alleged a tort by the Emergency Fleet Corporation, and that the mere fact that the Fleet Corporation might be an agent of the Government could not in any event excuse it from the consequences of its tortious acts. The Court said, at page 568, of the opinion:

> "We attach no importance to the fact that the second contract, alleged to have been illegally extorted, was made with the Fleet Corporation 'representing the United States of America.' The Fleet Corporation was the contractor, even if the added words had any secondary effect."

It will be noted that the Court said that the Fleet Corporation was the contractor. That can mean but one thing, that the Fleet Corporation was the party to the contract.

In the *Astoria* case, the suit was for damages for breach of contract, the contract being in almost every particular similar to the shipbuilding contracts in the present case, and contained the words, "representing the United States." Of this contract this Court said (p. 569):

> "Throughout the contract the undertakings of the party of the second part are expressed to be undertakings of the Corporation, and it is this corporation and its officers that are to be satisfied in regard to what is required from the Iron Works.
>
> . . . . . .

> "The whole frame of the instrument seems to us plainly to recognize the Corporation as the immediate party to the contract. The distinction between it and the United States is marked in the phrase last quoted. If we are right in this, further reasoning seems to us unnecessary to show that there was jurisdiction of the suit. The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States."

This appears to be a direct and unequivocal holding of this Court that the contract sued upon was not a contract of the United States, but a contract of the Fleet Corporation.

The third case, entitled *United States Shipping Board Emergency Fleet Corporation, representing the United States, vs. Wood, trustee in bankruptcy*, is also decisive of this question.

In that case the contract in question was in all material respects exactly similar to the main shipbuilding contracts in the case at bar. Under that contract the Fleet Corporation had paid large sums of money when the shipbuilding company defaulted upon its contract and was forced into bankruptcy. A claim for the money advanced under this contract was presented to the referee by the Fleet Corporation on behalf of the United States. A preference was claimed for this indebtedness on the ground that the United States was entitled to a preference.

There were thus two questions to be decided: First, was the claim a claim of the United States or a claim of the Fleet Corporation? Second, if it were a claim of the United States, was the United States entitled to a preference?

The Circuit Court of Appeals had held that the debt was not a debt due to the United States, but was a debt due to the Fleet Corporation and, therefore, it was unnecessary to determine whether, if it were a debt of the United States, the United States would have a preference (274 Fed. 893).

This Court affirmed the order of the Circuit Court of Appeals and, in referring to the claim for preference on account of this debt, said (p. 570):

> "It was denied successively by the referee, the District Court and the Circuit Court of Appeals on the ground that the Fleet Corporation was a distinct entity, and that, whatever might be the law as to a direct claim of the United States, the Fleet Corporation stood like other creditors and was not to be preferred. 274 Fed. 893. The considerations that have been stated apply even more obviously to this case."

There had been no question in the previous cases as to whether or not the United States was entitled to a preference; therefore, in using the words "the considerations that have been stated apply even more obviously to this case," this Court must have referred to the language it had just previously used in deciding the *Astoria* case, where, under a similar contract, it had held that the Fleet Corporation was the contractor.

It seems a fair deduction that this decision was based squarely upon the ground that the debt arising under such a contract was not a debt of the United States, but was a debt of the Fleet Corporation. If this be true, it follows that here is the final authority holding that contracts similar to the ones in the case at bar are not contracts of the United States.

See also:

Haines vs. Lone Star Shipbuilding Co., 268 Penn. 92;

Providence Engineering Co. vs. Downey, 294 Fed. 641;

United States vs. Matthews, 282 Fed. 266;

United States vs. Wood, 280 Fed. 109;

Providence Engineering Co. vs. Downey, 3 Fed. (2d) 154.

The record shows that whatever claim the Fleet Corporation has against the petitioner on account of these contracts has been assigned to the United States, and that the United States is threatening a suit thereon. The claims for credit which the petitioner has against this threatened suit arise out of the original contracts and transactions and, therefore, would be proper claims for credit in the event the Fleet Corporation itself brought suit, and could be pleaded and proved in such a suit without hindrance.

The situation thus presented is that had the Fleet Corporation brought suit against petitioner upon these contracts petitioner could have set up and proved its credits, but the assignment by the Fleet

Corporation to the United States and the refusal of the Comptroller General to act places petitioner in a position where it is in grave danger of losing its rights to establish such credits, through no fault of its own.

Point VII.

SUIT ALREADY COMMENCED BY THE UNITED STATES IS NOT ON ASSIGNED CLAIM, BUT ON DIRECT CLAIM THAT THESE ARE CONTRACTS OF THE UNITED STATES; SECTION 951, R. S., THEREFORE, IS CLEARLY APPLICABLE.

If the action now pending is properly brought by the United States directly, without pleading the assignment, then necessarily the credits growing out of the same contracts are credits against the United States, and the Comptroller General should be compelled to act. This would be in accordance with the decision of the Supreme Court in the case of *United States vs. Hawkins*, 10 Pet. 125, where the then accounting officers of the Treasury did act after suit commenced, and such act was approved by the Supreme Court.

It must be apparent, however, that the attorneys for the United States may at any moment change their mind and bring a suit upon the assigned claim. Indeed, counsel for petitioner believe that such is the only suit which the United States can maintain. As the statute of limitations never runs against the United States, a new suit pleading the assignment may, of course, be filed at any time. In fact, the

record in this case shows that such suit is actually threatened (R. 4).

So that whether the suit by the United States now pending upon an alleged direct claim or whether the threatened suit by the United States upon the assigned claim be the suit which the United States will eventually seek to maintain, the respondent in either case should be required to act upon petitioner's claim in order that petitioner may not be deprived of the right to present such legitimate credits as it may be able to establish.

Conclusion.

The decision of the lower court leaves the petitioner in an extraordinarily awkward position. The United States has commenced suit upon these contracts in the United States District Court at Seattle. The petitioner here, who is the defendant in the Seattle suit, has what it considers to be perfectly legitimate credits in large amounts growing out of the original transaction. The same United States District Court before which the suit against the petitioner is now pending has held in the case of *United States vs. Fisher Flouring Mills Company, supra*, that in such a suit by the United States the defendant cannot be allowed any credits unless Section 951, R. S., be complied with. The appellant has done everything it can do to comply with the conditions of Section 951, R. S. It first presented its claim to the Auditor for the State and Other Departments, who at that time was the proper accounting officer of the Treasury, and that officer re-

fused to pass upon the claim. After the Comptroller General superseded the accounting officers of the Treasury, the claim was again presented to the Comptroller General, and that officer refused to pass upon the claim.

Section 951, R. S., says that no credit can be allowed in suit by the United States unless such claim has been presented and disallowed by such officer. Consequently, unless this Court grants this petition, there is grave danger that the Seattle court may hold petitioner barred, despite its utmost diligence, from proving its proper claim for credit.

We submit that the United States should not be permitted to deprive a defendant of the right given by statute, to prove a credit, through the refusal of one of its own officers to act upon a properly presented claim, and that therefore the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Attorneys for Petitioner.

ADDENDA.

Since the foregoing brief was printed, the Circuit Court of Appeals for the Ninth Circuit, in an opinion rendered January 31, 1927, has affirmed that part of the decision of Judge Cushman in the case of United States vs. Fisher Flouring Mills Co., 295 Fed. 691, holding that in a suit by the United States upon an assigned claim the defendant cannot be allowed a credit unless the claim for such credit has first been presented to the accounting officers of the Treasury and by them disallowed, and that such presentation and disallowance must be pleaded in the answer. This decision emphasizes the necessity of the issuance of a writ in the present case unless grave injustice is to be done.

However, if this Court be of opinion that petitioner is entitled to prove its credits in the action by the United States now pending in Seattle, and also in the action threatened by the United States upon the claim assigned by the Fleet Corporation, without further action by the Comptroller General, then the whole purpose of this litigation will be accomplished by a holding of this Court to that effect.